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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 IAN CHRISTOPHERSON,

8 Plaintiff(s),

9 v.

10 UNITED STATES OF AMERICA,

11 Defendant(s).

Case No. 2:16-CV-2872 JCM (PAL)

ORDER

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13 Presently before the court is defendant Randall Roske's motion to dismiss. (ECF No. 9).
14 Plaintiff Ian Christopherson¹ filed a response (ECF No. 12), to which Roske replied (ECF No. 14).

15 Also before the court is defendant Joshua Tomshek's motion to dismiss. (ECF No. 15).
16 Plaintiff filed a response. (ECF No. 21). Tomshek has not filed a reply, and the time to do so has
17 since passed.

18 Also before the court is defendant United States of America's motion to dismiss. (ECF
19 No. 18). Plaintiff filed a response. (ECF No. 20). The United States has not filed a reply, and the
20 time to do so has since passed.

21 **I. Facts**

22 This case arises out of a criminal conviction for tax evasion. Defendant Roske was
23 plaintiff's counsel during his criminal trial. (ECF No. 1 at 2). Defendant Tomshek represented
24 plaintiff for certain post-conviction proceedings occurring between December of 2011 and March
25 of 2013. *Id.* Plaintiff alleges that both defendants committed legal malpractice that led to
26 plaintiff's conviction and sentence. *Id.* at 6. Plaintiff further alleges that but for defendants'
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¹ Plaintiff represents himself *pro se* in this action.

malpractice, plaintiff would not have been convicted of tax evasion or would have had his conviction overturned, either at the trial court or on appeal. *Id.*

After his conviction and sentencing, Alina Shell of the federal public defender's office represented plaintiff on appeal. *Id.* at 5. Plaintiff alleges that Shell mishandled plaintiff's appeal which, if properly handled, would have led to a reversal of plaintiff's conviction. *Id.* at 6.

Plaintiff filed a motion to vacate under 28 U.S.C. § 2255 in April of 2015. *Id.* at 2. Plaintiff has not yet obtained a ruling on his 2255 motion. *Id.*

II. Legal Standard

a. Subject matter jurisdiction

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Federal Rule of Civil Procedure 12(b)(1) allows defendants to seek dismissal of a claim or action for a lack of subject matter jurisdiction. Dismissal under Rule 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on its face sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984–85 (9th Cir. 2008).

Although the defendant is the moving party in a 12(b)(1) motion to dismiss, the plaintiff is the party invoking the court's jurisdiction. As a result, the plaintiff bears the burden of proving that the case is properly in federal court to survive the motion. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). More specifically, the plaintiff's pleadings must show "the existence of whatever is essential to federal jurisdiction, and, if [plaintiff] does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment." *Smith v. McCullough*, 270 U.S. 456, 459 (1926).

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1 *b. Pleading requirements*

2 A court may dismiss a complaint for “failure to state a claim upon which relief can be
3 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
4 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*
5 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual
6 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
7 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

8 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
9 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
10 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
11 omitted).

12 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
13 when considering motions to dismiss. First, the court must accept as true all well-pled factual
14 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
15 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory
16 statements, do not suffice. *Id.* at 678.

17 Second, the court must consider whether the factual allegations in the complaint allege a
18 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
19 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the
20 alleged misconduct. *Id.* at 678.

21 Where the complaint does not permit the court to infer more than the mere possibility of
22 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*
23 (internal quotation marks omitted). When allegations in a complaint have not crossed the line
24 from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

25 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
26 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

27 First, to be entitled to the presumption of truth, allegations in a complaint or
28 counterclaim may not simply recite the elements of a cause of action, but must
contain sufficient allegations of underlying facts to give fair notice and to enable
the opposing party to defend itself effectively. Second, the factual allegations that

1 are taken as true must plausibly suggest an entitlement to relief, such that it is not
2 unfair to require the opposing party to be subjected to the expense of discovery and
continued litigation.

3 *Id.*

4 **III. Discussion**

5 Defendants Roske and Tomshek filed motions to dismiss, both arguing that a cause of
6 action has not accrued against them as plaintiff has not obtained successful relief from his
7 conviction. Defendant United States argues, in addition to the argument raised by the other
8 defendants, that the court lacks jurisdiction to hear plaintiff's claims against the United States.

9 Plaintiff's response asserts that the FTCA is not clear on when a cause of action accrues
10 (although plaintiff admits that a cause of action has not accrued under state law). Plaintiff further
11 asserts that in the event the court reviewing plaintiff's § 2255 motion does rule against him it
12 would be due to defendant's alleged malpractice, so therefore a cause of action has already accrued
13 and the only question left is one of damages. Plaintiff requests in the alternative that, in the event
14 that claims have not accrued against defendant, the court stay the case or dismiss the complaint
15 without prejudice to re-file.

16 *a. Subject matter jurisdiction*

17 The FTCA creates "a limited waiver of the United States' traditional sovereign immunity,
18 authorizing third parties to file certain civil tort suits against the government for monetary
19 damages." *Vickers v. United States*, 228 F.3d 944, 948 (9th Cir. 2000). The FTCA grants federal
20 courts jurisdiction over claims:

21 [F]or injury or loss of property, or personal injury or death caused by the negligent
22 or wrongful act or omission of any employee of the Government while acting within
23 the scope of his office or employment, under circumstances where the United
States, if a private person, would be liable to the claimant in accordance with the
law of the place where the act or omission occurred.

24 28 U.S.C. § 1346(b)(1).

25 The FTCA defines an "employee of the government" for purposes of the act to include
26 "any officer or employee of a Federal public defender organization, except when such officer or
27 employee performs professional services in the course of providing representation under section
28 3006A of title 18." 28 U.S.C. § 2671.

1 Here, § 3006A prompted the FPD's appointment and representation of plaintiff during the
2 course of his appeal. Therefore, defendant Shell, an FPD employee who provided professional
3 services, is not considered an employee of the government for purposes of FTCA liability. *See* 28
4 U.S.C. § 2671. As plaintiff provides no other basis for asserting that the United States has waived
5 sovereign immunity in this case, the court lacks jurisdiction to consider plaintiff's claims against
6 the United States.

7 *b. Pleading requirements*

8 Tort claims are not the proper way to make collateral challenges to criminal convictions.
9 *See Heck v. Humphrey*, 512 U.S. 477, 484–85 (1994). In *Heck*, the court held,

10 [I]n order to recover damages for allegedly unconstitutional conviction or
11 imprisonment, or for other harm caused by actions whose unlawfulness would
12 render a conviction or sentence invalid, a § 1983 plaintiff must prove that the
13 conviction or sentence has been reversed on direct appeal, expunged by executive
14 order, declared invalid by a state tribunal authorized to make such determination,
15 or called into question by a federal court's issuance of a writ of habeas corpus.

16 *Id.* at 486–87.

17 In *Erlin v. United States*, 365 F.3d 1127 (9th Cir. 2004), the Ninth Circuit held that the
18 FTCA contains the same restrictions as those outlined in *Heck* on when a litigant can bring suits
19 based on the alleged invalidity of a conviction. *Id.* at 1132 (“Just as the Supreme Court [in *Heck*]
20 read § 1983 as containing a restriction on when a litigant can bring a suit that impugns the validity
21 of a conviction or imprisonment, we read the FTCA as containing the very same restrictions.”).

22 Here, plaintiff has not obtained a favorable ruling on his § 2255 motion. Further, he has
23 not alleged that his conviction has been otherwise expunged or declared invalid. As such, plaintiff
24 has not accrued a cause of action against defendants upon which relief can be granted. *See Erlin*,
25 365 F.3d at 1132. The court will grant defendants' motions to dismiss without prejudice to re-file
26 in the event plaintiff successfully challenges his conviction.

27 **IV. Conclusion**

28 Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant Roske's motion
to dismiss (ECF No. 9) be, and the same hereby is, GRANTED.

1 IT IS FURTHER ORDERED that defendant Tomshek's motion to dismiss (ECF No. 15)
2 be, and the same hereby is, GRANTED in part and DENIED in part, consistent with the foregoing.

3 IT IS FURTHER ORDERED that defendant United States' motion to dismiss (ECF No.
4 18) be, and the same hereby is GRANTED.

5 Plaintiff's claims against defendants Roske, and Tomshek will be dismissed without
6 prejudice. Plaintiff's claim against defendants United States of America will be dismissed with
7 prejudice.

8 DATED December 1, 2017.

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11 UNITED STATES DISTRICT JUDGE
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